United States Constitution - 14th Amendment

Section 1. All persons born or naturalized in The United States and subject to the jurisdiction thereof, are citizens of The United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of The United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. Overview

This is an equity action in which Mary Chalkey, deceased, now the Estate of Mary Chalkey, hereinafter referred to as Chalkey, sought to have a deed transferring real property from herself to the Petitioner, Franklin D. Roush, Jr., (Roush) declared null and void on the basis of undue influence. An ex parte injunction was granted by Judge Timothy P. Creany and at the preliminary injunction hearing the injunction order was continued. At the conclusion of the preliminary injunction hearing Judge Creany sua sponte determined Chalkey needed a guardian ad litem, removed Chalkey's counsel Rex McQuaide, appointed attorney Gary Horner as her guardian ad litem and to act as Chalkey's attorney. Approximately nine (9) months later at the trial on the merits, after Chalkey's counsel presented no evidence, Roush made a Motion to Dismiss which Judge Creany denied on the basis that

Chalkey did not intend to call any witnesses. After Roush presented one witness, Judge Creany announced without prior *notice*, sua sponte, that the Court was incorporating all prior transcripts unless there were objections. Roush immediately made a second Motion to Dismiss that was effectively denied.

On the first appeal, the Superior Court of Pennsylvania found that a meaningful appellate review was not possible. The Court vacated and remanded the case with instructions for the trial court to address Roush's first issue of whether the trial court erred in sua sponte incorporating evidence that was presented at an earlier preliminary injunction hearing into the equity trial held on the merits of the complaint seeking to set aside a conveyance, despite Roush's Motion to Dismiss this case because Chalkey presented no evidence at the equity trial. The Superior Court of Pennsylvania held that the opinion and order are predicated on evidence presented at an eairler hearing held to determine whether to continue a preliminary injunction. At that hearing, Chalkey bore the burden of showing "an urgent necessity for interim relief before the case [could] be heard on the merits." "At the hearing addressing the issues in this appeal, however, Chalky was required to show by clear and convincing evidence that Roush exercised undue influence." The Supreme Court of Pennsylvania affirmed the Superior Court's directive to vacate and remand.

On remand Judge Creany never addressed the issues from the Pennsylvania Supreme and Superior Courts but rather reissued the same Decree Nisi. Roush filed Post Trial Motions raising all known issues for appeal.

After hearing arguments on the Post Trial Motions, on February 14, 2003, Judge Creany disclosed that a conflict of interest existed for him since at least 2001, in that Chalkey's counsel and guardian ad litem, Gary Horner, represented the Judge's father's estate for which the Judge was Executor. Judge Creany's disclosure of this conflict of interest was first revealed to Roush and his attorney, Mr. H. Reginald Belden, now deceased, after all procedural time had elapsed for raising state and federal constitutional grounds specifically for an appeal.

Judge Creany acknowledged that while this instant case was pending before him, he issued findings of fact and conclusions of law in a Decree Nisi, and heard arguments on Roush's exceptions and motions for post trial relief, Mr. Horner was his lawyer. Mr. Horner filed a claim on behalf of the estate with Judge Creany as a moving party. Judge Creany, upon motion of Roush's attorney, Mr. Belden, recused himself stating "...I apologize to everyone. Frankly, this is something that I should have brought to everyone's attention, should have done before this point." Transcript of February 14, 2003, (app A25-A28) proceedings in which Judge Creany disclosed for the first time his conflict of interest . Then after Judge Creany spoke to Judge Krumenacker, ex parte, he sent a letter to both attorneys of record declaring his recusal was a "limited" recusal and wanted this case back after Judge Krumenacker agrees or disagrees with his Decree Nisi despite his acknowledged conflict of interest. Roush filed a Motion for Permanent Recusal, Judge Creany never withdrew his Decree Nisi and Judge Krumenacker adopted it as his Order without alteration.

Roush never waived Judge Creany's conflict of interest issue.

On the second appeal, The Superior Court of Pennsylvania upheld Judge Krumenacker's Final Order of Judge Creany's Decree Nisi, stating in part that Roush's Motion to Dismiss was based upon Horner's failure to provide a list of witnesses and not based upon a lack of evidence. Despite no witnesses testifying against Roush at the equity trial, the trial court determined that it should take Roush's real estate. The Supreme Court of Pennsylvania denied Roush's Petition For Allowance of Appeal as well as his Application For Reconsideration of Appeal which was denied on May 31, 2005, (app. A1).

B. Argument

This Court's precedent as announced in Wood v. Georgia, 450 U.S. 261, 271, 570, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1980), granted review of a conflict of interest that might have denied the employees due process even though this issue was *never raised* in state court. In Wood, this Court not only vacated the judgment below because the trial court had failed to investigate a possible conflict, but it also instructed the trial court to conduct a new revocation hearing if it found that an actual conflict existed and that the petitioners had *not* waived their right to conflict free counsel. In the instant case, Judge Creany acknowledged that he had concealed a conflict of interest requiring his recusal from the case.

C. Trial Judge Concealed His Conflict of Interest

Certainly, Petitioner is entitled to a conflict free trial judge. That right was never waived. Roush was not permitted to raise the trial judge's conflict of interest on appeal in Post Trial Motions. Post Trial Motions in Pennsylvania are necessary to preserve issues for appeal and are to be filed within ten (10) days of the issuance of the Decree Nisi. Roush was unaware until long past the time limit for such filings, that the Judge's conflict existed. Judge Creany by his own admission concealed his conflict of interest with Chalkey's counsel from Roush and his lawyer. In Schlesinger v.Councilman, 420 U.S. 738, 743, 955 S. Ct. 1300, 43 L. Ed. 2d 591 (1975), this Honorable Court held that when "jurisdiction and equity issues...[are] sufficiently important" courts may consider issues on appeal that were not raised below." See also, Yee v. Escondido, 504 U.S. 519 at 538, 112 S. Ct. 1522, 1534, 118 L. Ed. 2d 153 (1992), where the Court will review judgments of a state court on Petitioner's claims that were not raised below. Petitioner is using the due process violation argument guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America to support what has been some of his consistent claims in state court. However, it was procedurally impossible for Roush to timely raise on appeal Judge Creany's hidden conflict of interest, starting when he sua sponte placed his personal attorney as guardian ad litem for Chalkey against Roush, because the Judge's personal business relationship with Horner was unknown to Roush and his lawyer until long after the proceedings were closed.

Judge Krumenacker's Final Decree that affirmed

verbatim Judge Creany's admitted conflict of interest Decree Nisi illustrates the need for an automatic vacate and dismiss rule. Where a defendant (Roush) is forced to accept on appeal a conflict of interest judicial decision made during a critical stage of the proceeding due to a trial judge's unprofessional concealment of his conflict of interest his, findings of fact and conclusions of law should be vacated and the case dismissed. The Final Decree ordered by Judge Krumenacker is based solely and completely on the affirmed tainted Decree Nisi issued by Judge Creany while he had an admitted conflict of interest with Chalkey's counsel.

Judge Creany ordered Judge Krumenacker to use his Decree Nisi (containing his findings of fact and conclusions of law) to resolve the motions currently before him, and "either adopt the Decree Nisi drafted by this court or draft his own permanent decree, presuming that the (Roush's) motions are denied." Judge Creany's directive to Judge Krumenacker to use his findings of fact and conclusions of law in his Decree Nisi as part of his recusal order of April 7, 2003, (app. A20-A23) illustrates Judge Creany's intent to maintain control over the disposition of this case regardless of his personal conflict of interest. This conduct violates Roush's Due Process rights to a fair and impartial trial judge guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America, thus requiring the Pennsylvania Superior Court's Order of June 4, 2004, (app. A4-A19) to be vacated and this case dismissed.

Judge Krumenacker's Final Decree was based solely verbatim on the findings of fact and conclusions of law

in Judge Creany's Decree Nisi that was ordered against Roush while Judge Creany had an admitted conflict of interest with Chalkey's counsel who is his own personal attorney of record and other matters.

Once Judge Creany disclosed his concealed conflict of interest with Chalkey's counsel he was obligated to retroactively vacate his findings of fact, conclusions of law and the Decree Nisi dated December 16, 2002.

> Liljeberg v. Health Services Acquisition Corp., 486 U.S. at 860-861, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). Orders that were made during the time a reasonable person would harbor doubts about the judge's impartiality should be vacated retroactively.

Instead, the record reflects that during arguments on Roush's Motion for Permanent Recusal, Judge Creany chose the new judge and set forth his intention to ex parte influence findings of fact and conclusions of law to be made by Judge Krumenacker. "I will communicate with Judge Krumenacker today if he is here and let him know that... Judge Krumenacker must either adopt the Decree Nisi that I framed or draft his own Decree Nisi to which exceptions could be taken." Transcript of April 7, 2003, Motion For Permanent Recusal (app. A20-A23). Thereafter, as part of Judge Creany's recusal order he directed that, "Further, Judge Krumemacker shall, on resolution of the motion currently before him, either adopt the Decree Nisi drafted by this court or draft his own permanent decree,

presuming that the motions are denied." Judge Creany's adjudication of April 7, 2003, in his recusal order forwarded his determination of the legal and factual findings in this case through his Decree Nisi as an order tainting Judge Krumenacker to be impartial and bias against Roush.

The Pennsylvania Superior Court's Order issued June 4, 2004, is a violation of Petitioner's Constitutional Due Process rights guaranteed by 5th and 14th Amendments to The Constitution of The United States of America and therefore should be vacated and this case dismissed, because it is the result of a judicially declared conflict of interest with a bias Decree Nisi, findings of fact and conclusions of law.

> In the case of Liljeberg v. Health Services Acquisition, 486, U.S. 847 (1988), this Supreme Court held that a final order be vacated and complaint dismissed when a judge has a conflict of interest which he fails to disclose. A violation of 28 U.S.C. section 455 (a) which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, occurs when a reasonable person knowing relevant facts, would expect that a judge knew of the circumstances creating the appearance of partiality, notwithstanding that the judge was not actually conscious of these circumstances. Moreover, in a proper case, section 455 (a) applies retrospectively, as well as prospectively,

> and requires a judge upon discovery that he performed a discretionary judicial act under circumstances that would cause an objective observer to question his impartiality, to rectify an oversight and to take steps necessary to maintain public confidence in the impartiality of the judiciary. For example such judge may be required to disqualify himself retrospectively and to vacate his discretionary judicial action in violation of section 455 (a).

Roush is entitled to the same Due Process guaranteed by a fair and impartial trial judge in state court that the Federal Rules of Civil Procedure require in the federal court because it is the same protected Due Process rights guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America.

> Liljeberg, 486 U.S. at 863-64, stated that Rule 60 (b) (6) relief is accordingly neither categorically available nor categorically unavailable for all section 455 (a) violations. We conclude that in determining whether a judgment should be vacated under Rule 60 (b)(6) for violation of section 455 it is appropriate to consider the risk of injustice to the parties in the particular case, the risk of denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the justice process.

In Cuyler v. Sultan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) a mandated reversal applies when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists." The record in Roush demonstrates that the trial judge actually concealed his business conflict of interest with Chalkey's counsel when he ordered a Decree Nisi against Roush, thus Due Process mandated a reversal.

> Due Process ...[requires] that a judge who is otherwise qualified to reside at trial or other proceeding must be sufficiently neutral and free of disposition to be able to render a fair decision. No person should be required to stand before a judge with "bent of mind", Berger v. United States, 255 U.S. 22, 33, 41 S. Ct. 230, 233, 65 L. Ed. 481 (1921). In Holloway v. Arkansas, 435 U.S. 475, S. Ct. 1173, 55 L. Ed. 2d 426 (1978) the Court created an automatic reversal rule, where defense counsel is forced to represent co-defendants over his timely objection unless the trial court has determined that there is no conflict. "Whenever a trial court improperly requires joint representation over timely objections reversal is automatic."

In Roush, the trial court judge after recusing himself for his business relationship with Chalkey's counsel, who is representing the judge in his individual capacity and as a joint moving party in another law suit, forces

upon Roush improperly to accept his findings of fact and conclusions of law in a Decree Nisi, over timely objections. Thus, in keeping with the reasoning in other conflict of interest holdings of this Court, an automatic reversal rule should be applied to the Pennsylvania Superior Court Order of June 4, 2004, because the trial judge sitting as the trier of fact violated Petitioner's Due Process rights guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America, by concealing his conflict of interest while determining the findings of fact and conclusions of law in this case.

In Roush, Chalkey presented no evidence whatsoever, and "but for" the trial judge's advocacy of sua sponte incorporating prior testimony from a preliminary injunction hearing into the trial on the merits, despite two Motions to Dismiss, the proceeding would have been different. This Court has held in several cases that "circumstances of that magnitude" during a critical stage of the proceedings, i.e. actively an attorney represented conflicting interest United States v. Cronic, 466 U.S. 648, 659, N. 26, 104 S. Ct. 2039, 60 L. Ed. 2d 657 (1984) presumes a probable effect upon the outcome. This Court's automatic reversal rule in Holloway should apply in Roush because the trial judge found as a matter of fact that he had a conflict of interest with Chalkey's counsel, recused himself but despite objections, forwarded his findings of fact and conclusions of law in a Decree Nisi to Judge Krumenacker who affirmed verbatim. Holloway at 490 presumed moreover, that the conflict undermined the adversarial process and the presumption was justified because joint representation

of conflicting interest is inherently suspect. Roush calls an even greater disaster to this Court's attention, that of a judge undermining the integrity, independence, and fundamental fairness of the judicial process by concealing his conflict of interest until the time limit for raising issues on appeal in Post Trial Motions had long expired. Consequently, Roush never waived his right to a conflict free trial judge, and the effect of the concealed conflict is inherently suspect on crucial matters that makes it difficult to measure the precise harm arising from the conflict of interest.

The divergent conflicting interest concealed by Judge Creany raised the important federal question of what the Due Process obligations were to Roush after he disclosed his conflict of interest with Chalkey's counsel. Judge Creany decided the important federal question in a way that conflicts with relevant decisions of this Court by not vacating his Decree Nisi, findings of fact and conclusions of law. Judge Creany's concealed conflict of interest so infused the proceedings with unfairness that it denied Due Process of law which prevented a fair trial. In Lisenba v. California, 314 U.S. 219, at 236 (1941) this Court held, it is well established that denial of Due Process in a state trial is the failure to observe that fundamental fairness essential to the very concepts of justice. The absence of that fairness totally infects the trial and prevents a fair trial.

D. Appeal Court Raised and Decided New Issue

The Superior Court of Pennsylvania on appeal upheld denial of Roush's first Motion to Dismiss by, without notice, raising and deciding a new issue,

characterizing the motion as limited to Chalkey's failure to provide a list of witnesses. However, the complete text of the motion demonstrates that Roush raised the issue of lack of notice of any evidence that Chalkey would be presenting at trial "...a list of his witnesses, what they were going to testify to, about and any type of reports he has." Chalkey's counsel stated "...if there were witnesses to be called I certainly would have made them available." The trial court stated, "So far as the equity proceedings is concerned, if you have no witnesses that you expect to call... then on that basis I'll deny the Motion to Dismiss."

Upon Respondent counsel's statement that no witnesses at all were going to be presented, and the trial judge basing his denial on no witnesses expected to be called, Roush's Motion can not fairly be interpreted as being limited to the existence of a list. Chalkey bearing the burden of proof by clear an convincing evidence at trial, has just announced that she is presenting no case and the trial court has agreed with her. Roush had no notice that he would have to defend himself in an equity trial in which no witness or evidence whatsoever would be presented against him by Chalkey. Thus, The Superior Court of Pennsylvania Order issued June 4, 2004, is a violation of Petitioner's guaranteed right to notice and opportunity to be heard, Due Process of the 5th and 14th Amendments to The Constitution of The United States of America.

> In re Munchison, 349 U.S. 133, 136 (1955) due process is the right to a "fair trial in a fair tribunal." Also, see Coy v. Iowa, 487 U.S. 1072 (1988)

> due process includes the "right to confront adverse witnesses. In Fuentes v. Shevin, 407 U.S. 67, 82 (1972) procedural due process guarantees protection against "arbritary taking." In Wolf v. Donnell, 418 U. S. 539, 558 (1974) this Court addressed whether the fault lies in a denial of fundamental procedural fairness.

Thus such fundamental fairness from the abuse of power as an instrument of oppression should apply to all courts. Advocacy by a trial court for a party should be a fundamental violation of due process.

> Due Process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). "Due Process is flexible and calls for such procedural protection as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

On appeal, The Superior Court of Pennsylvania did not acknowledge Roush's second motion to dismiss but rather, stated that "it appears from the record that the parties proceeded in accordance with an understanding that Chalkey's testimony would be incorporated into the record." In fact, no where in the record was there ever an appearance, nor understanding that Chalkey's prior preliminary injunction hearing testimony would be incorporated. It makes no sense that Roush would have ever agreed at trial, when Chalkey presented no evidence, that testimony from a prior preliminary

injunction hearing would be his trial on the merits. Chalkey never moved to incorporate, nor argued on appeal that there ever was an understanding between the parties for incorporation of a prior preliminary injunction hearing into the trial on the merits. This was part of a new issue raised and decided by The Superior Court of Pennsylvania, on the second appeal, searching for a reason why the trial went on without any evidence presented by Plaintiff. The Post Trial Motions required to be filed limiting the issues for appeal were filed long before Roush and his lawyer were aware of Judge Creany's conflict of interest and ultimate recusal. The Superior Court of Pennsylvania, on appeal, was unaware that the trial judge had an on going business relationship with Chalkey's lawyer. Perhaps this business relationship with the trial judge, while the present case was decided in a Decree Nisi, might shed an entirely different understanding of why the trial proceeded and Chalkey's testimony was incorporated into the record. The findings of fact and conclusions of law prepared by Judge Creany were adopted by The Superior Court of Pennsylvania through raising a new issue, on appeal, in part by finding the appearance of an understanding.

There was no evidence to object to until Judge Creany made his own sua sponte incorporation at the end of the proceedings. Immediately, Roush made a second Motion to Dismiss that was effectively denied.

Judge Creany specifically denied Roush's first Motion to Dismiss on the basis that no witnesses were expected to be called. The trial judge should not be excused from giving false notice at the beginning of the

trial. Due Process requires timely adequate notice before the trial, to prepare a defense, even if the trial judge intends to improperly become an advocate for a moving party. Petitioner was as surprised with Judge Creany's sua sponte move to incorporate prior proceedings as he was to learn that Respondent's lawyer had an on going business relationship with the trial judge.

It was procedurally impossible for Petitioner to have timely raised on appeal the trial judge's concealed conflict of interest that was unknown to Petitioner and his lawyer until long after the limited time for filing Post-Trial Motions had elapsed. This "gross miscarriage of justice", of *I got ya!*, which seriously affected the fairness, integrity and public reputation of the judicial proceedings is basis for the Superior Court of Pennsylvania's finding of fact and conclusions of law.

Had it not been "but for" the judge's sua sponte incorporation, without prior notice, after the taking of testimony had closed of a prior preliminary injunction hearing proceeding, held on different issues and a different burden of proof than the trial on the merits, there would have been no evidence presented against Petitioner. Respondent's counsel announced and Judge Creany acknowledged, that Plaintiff intended to offer no evidence at trial in response to Defendant's Motion To Dismiss. Then, the judge denied the Motion to Dismiss because no one was going to testify against Defendant in the equity trial on the merits. This significant departure from any semblance of a trial on the merits in an equity proceeding will become the law

in Pennsylvania if this Court does not grant a Writ of Certiorari.

Without this Court's intervention many people will suffer from the total breakdown of Due Process in Pennsylvania. The Superior Court of Pennsylvania decision issued June 4, 2004, is not substantiated by the record and there is no indication that Roush had notice that Judge Creany was unilaterally going to create a witness where none existed. Roush immediately moved for dismissal on multiple grounds; that no testimony had been presented against him; that testimony from a preliminary injunction proceeding was limited in scope and not sufficient to meet the burden of proof by clear and convincing evidence.

This Court held in Calderon v. Thompson, 523 U.S. 538 (1998) "... that the general rule to be that, where a federal court of appeals sua sponte recalls its mandate to visit the merits of an earlier decision... the court abuses its discretion unless it acts to avoid a miscarriage of justice..."

Historically this Court has not looked favorably on appellate courts that raise and decide on appeal an issue sua sponte other than to determine jurisdiction.

In Roush on his first appeal, The Superior Court of Pennsylvania held that a meaningful appellate review was not possible because the trial judge never addressed Roush's first issue of whether the trial court erred in sua sponte incorporating evidence that was presented at an earlier preliminary injunction hearing into the equity trial held on the merits of the complaint seeking to set

aside a conveyance, despite Roush's Motion to Dismiss this case because Chalkey presented no evidence at the equity trial. The Superior Court of Pennsylvania held that the opinion and order are predicated on evidence presented at an earlier hearing held to determine whether to continue a preliminary injunction. At that hearing, Chalkey bore the burden of showing "an urgent necessity for interim relief before the case [could] be heard on the merits." "At the hearing addressing the issues in the appeal, however, Chalkey was required to show by clear and convincing evidence that Roush exerted undue influence." The Order was vacated and remanded. The trial court never addressed the remand.

On the second appeal now before this Court, The Superior Court of Pennsylvania, raised and decided a new issue limiting Roush's first Motion to Dismiss to a failure to receive a witness list and found the appearance of an understanding to incorporate. The parties never raised this argument on appeal, and the appeal court revisited the exact same facts through raising and deciding a new issue on appeal without any notice or opportunity for Petitioner to be heard.

On the same facts that the majority of nine (9) appeal judges held that a meaningfully appellate review was not possible, and the majority of The Supreme Court of Pennsylvania agreed, now on a second appeal the majority of three (3) appeal judges revisited through an appeal and sua sponte raised and decided against Petitioner a new issue. A state court of appeals should be held to the same standard of due process as a federal court of appeals and the en banc earlier decision should have been upheld in Roush. It should be considered a

violation of Petitioner's Due Process rights guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America for a state appeal court to circumvent its earlier decision and on the same facts, revisit, raise and decide a new issue for a totally different outcome.

E. Concealed Pervasive Bias and Prejudice

This court has made it clear that "a fair trial in a fair tribunal is a basic requirement of due process." Withrow v. Larkin, 421 U.S. 35, 36, 95 S. Ct. 1426, 1459, 43 L. Ed. 2d 712 (1975).

Further, Judge Krumenacker's tainted predisposition by Judge Creany's findings of fact and conclusions of law in the Decree Nisi was so extreme that it displayed prejudice and bias while Judge Creany's concealed conflict on interest was taking place which requires a reversal of the Pennsylvania Superior Court's Order of June 4, 2004, and this case dismissed. Judge Krumenacker's mind was "irrevocably closed" before actual adjudication of his Final Decree. In Liteky v. U.S., 510 U.S 540, 551 (1994) a favorable or unfavorable predisposition can be characterized as "bias" or "prejudice" requiring recusal because, even though it springs from the facts adduced or the events occurring at trial it is so extreme as to display clear inability to render a fair judgment. The Final Decree issued by Judge Krumenacker showed no independent thought or consideration from that given by Judge Creany, who absolutely influenced Judge Krumenacker, thus causing a prejudicial result.

F. Undermine the Public's Confidence In the Judicial Process

If the holding in the case at bar is allowed to stand, a precedent is established that allows judicial review and intervention of private real estate transactions. The trial court would be imputed with authority to present evidence and testimony on behalf of a party whenever a party otherwise fails to set forth a case or meet the legal burden without notice prior to the hearing. Also, perhaps most importantly, there will be no requirement that the impartial authority, the judge, maintain a true, unadulterated appearance of conflict free impartiality. This result not only undermines public trust, integrity and confidence in the judiciary, but destroys the fundamental principals of due process and a fair trial protected and guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America. It means that in Pennsylvania one can sue in equity to resale real estate that was sold nearly two years earlier, allege fraud, undue influence, and never testify at the equity trial. In fact, the Plaintiff need not present any witness or case whatsoever, nor witness list because no one needs to testify against the Defendant and while the trial judge is simultaneously represented by the lawyer he sua sponte appointed for you, a valid deed will be voided so that you can resale Defendant's real estate because you just found another buyer for more money. If this does not undermine the publics confidence in the judicial process I can not imagine what would.

Notwithstanding the prejudice and bias that Judge Creany displayed against Roush through out all

proceedings in this case, Judge Creany has gone "too far" by concealing his admitted conflict of interest with Respondent's counsel and his recusal is not enough. The Final Decree holding with verbatim his intent to destroy Roush's reputation and integrity in the legal community is the risk that denial of relief to vacate will produce injustice in other cases.

No notice was ever given to Roush that his preliminary injunction hearing was going to be his trial on the merits. In fact, Judge Creany said the exact opposite before and after the preliminary injunction hearing, he stated, "We're not here for me to decide who gives back what to whom and whether the equity case has been made out. It's not the same burden of proof. Its not the same issues." Judge Creany's Decree Nisi that was affirmed by Final Order of Judge Krumenacker dated May 22, 2003, and upheld by The Pennsylvania Superior Court by Order issued June 4, 2004, if allowed to stand, shall deprive Roush of his real estate without a trial on the merits. This violation of Petitioner's Constitutionally guaranteed Due Process rights of the 5th and 14th Amendments to The Constitution of The United States of America establishes an abolishment of Due Process rights in Pennsylvania during an equity trial to void a valid deed.

G. Lack of Notice

Roush had no notice prior to the trial on the merits that his preliminary injunction hearing was going to be sua sponte incorporated by the trial judge into the trial on the merits, and be his trial on the merits. The preliminary injunction hearing was held three (3) days

after Roush was served the Complaint. The trial judge made the prior preliminary injunction hearing the trial on the merits without any notice prior to sua sponte incorporation. The Superior Court of Pennsylvania's assertion of Roush's second motion to dismiss was inadequate for failure to object, does not excuse the lack of adequate notice. For application of the due process requirement of adequate notice in a civil context, see Armstrong v. Manzo, 380 U.S. 545 (1965), Mullone v. Central Hanover Tr. Co., 390 U.S. 306 (1950), also Chaloner v. Sherman, 242 U.S. 455 (1917). This Court's discussion in these cases of the right to timely and adequate notice forecloses any contention that Roush ever received constitutionally adequate notice to believe that his preliminary injunction hearing was going to be, without another word said, his trial on the merits after the record for taking testimony was closed.

Prior to Roush, Pennsylvania law was well settled that it is improper for the trial judge to treat a hearing [for a] preliminary injunction as a final hearing on the merits and as a basis for a final decree. Judge Creany at both the beginning and end of the preliminary injunction hearing emphasized the hearing's limited scope and purpose. "Now we're here today on the preliminary injunction, whether to continue it...The equity action though as I say, is not before me today." "...we're not here for me to decide who gives back what to whom and whether the equity case has been made out. It's not the same burden of proof. It's not the same issues." However, without another word being said against Roush at the trial nine (9) months later, without prior notice, Judge Creany did the exact

opposite of his earlier directive. The Preliminary Injunction Hearing became the trial on the merits.

The Supreme Court of Pennsylvania has upheld this decision that conflicts with other state courts of last resort and this Court's decisions requiring notice and an opportunity to be heard.

Due Process of law in this Court and other state courts of last resort requires notice of the sort that is deemed constitutionally adequate in a civil proceeding. It does not allow a hearing to be held where loss of real property rights are at stake without giving a person timely notice, in advance of the hearing, of the specific issues that they must meet. Nor, in the circumstances of this case can it reasonably be said that the requirement of notice was waived. Indeed, one of the purposes of notice is to clarify the issues to be considered. Roush had no notice that his preliminary injunction hearing, without another word being said, was going to be his trial on the merits. The issues were different, in fact, the trial judge ordered Roush to limit his evidence and questioning to the issues of a preliminary injunction hearing only.

It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, at 552 (1965).

> (Frankfurter J. concurring) In Joint Anti-Fascist Refuge Committee v. McGrath, 341 U.S. 123, 170-172 (1951) "If the right to notice and a hearing

> is to serve its full purpose, then it is clear that it must be granted at a time when the depravation can still be prevented."

No notice had been given to Roush prior to the preliminary injunction hearing that it was going to be substituted as his trial on the merits. Roush lost his real property without any notice or opportunity to be heard after the trial judge refused to accept that no evidence was going to be presented. Also, Roush was deprived his Due Process right to confront adverse witnesses, Coy v. Iowa, supra, because the time for taking testimony at the trial on the merits was closed and the preliminary injunction hearing was held on different limited issues.

> This Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the depravation at issue takes effect. Bell v. Burson, 402 U.S. 533, 542, 91 S. Ct. 1585, 29 L. Ed. 2d 90 (1971).

In Roush, the preliminary injunction hearing was held without prior notice to Petitioner that it was to be the sole determination to deprive Petitioner permanent loss of his real property based on merit issues that were not raised nor allowed to be presented at the preliminary injunction hearing.

> In re Gault, 387 U S. 1 (1967) "Notice at the hearing is not timely notice. Notice, to comply with due process requirements, must be given sufficiently in advance of

scheduled court proceedings so that a reasonable opportunity to prepare will be afforded."

DIRECT AND CONCISE ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. Trial judge concealed his business relationship with Respondent's counsel.

Where a trial judge admittedly conceals his conflict of interest with Plaintiff's counsel, who is his own personal attorney, it might explain his advocacy and intentional violation of Roush's constitutionally protected Due Process rights guaranteed by the 5th and 14th Amendments to The Constitution of The United States of America requiring that his order be retroactively vacated and The Pennsylvania Superior Court Order issued June 4, 2004, be vacated and this case dismissed. In Wood v. Georgia, 450 U.S. 261, 271, 570, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1980), this Court granted review of a conflict of interest that might have denied employees due process even though the issue was *never raised* in *state* court. In Wood, this Court not only vacated the judgment below but it also stated that petitioners had *not* waived their right to a conflict free counsel. This Court held in Liljeberg v. Health Services Acquisition Corp., 486 U.S. at 860-861, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), that Orders, made during the time when a reasonable person would harbor doubt about a judge's impartiality,

should be vacated retroactively. Certainly, when a trial judge admittedly conceals his conflict of interest with an attorney representing a party to an action, until after the procedural time limit for raising and preserving issues for appeal have expired, the only remedy to the aggrieved party is for all the judge's Orders and Decrees to be retroactively vacated and the case dismissed, thus The Pennsylvania Superior Court Order issued June 4, 2004, should be vacated and this case dismissed. Roush has suffered a "miscarriage of justice" and as in Schlesinger v. Councilman, 420 U.S. 738, 743 (1975) holding that, when "jurisdictional and equity issues...[are] sufficiently important", courts may consider issues on appeal that were not raised below.

II. The trial judge, without notice sua sponte incorporates a prior preliminary injunction hearing when Plaintiff presented no evidence at trial.

The Supreme Court of Pennsylvania by denying Roush's Application For Reconsideration of Appeal, Order dated May 31, 2005, has upheld the violation of Roush's Constitutionally protected Due Process rights guaranteed by the 5th and 14th Amendments of The Constitution of The United States of America and established a major departure from the usual course of judicial proceedings that will abrogate all future Due Process rights of the people during an equity trial in Pennsylvania. In re Gault, 387 U.S. 1 (1967) "Notice at the hearing is not timely notice." However, in Pennsylvania one's valid deed can be declared void in an equity trial when Plaintiff presents no witness or

evidence whatsoever, states that he intends not to produce any witness at the beginning of trial in response to a Motion to Dismiss, which motion is denied by the trial judge on the basis that no witnesses will be called against Defendant. Thereafter, when the taking of testimony was closed, without prior notice or opportunity to be heard, the trial judge, despite a second Motion To Dismiss because Plaintiff presented no evidence against Defendant, sua sponte incorporates a prior preliminary injunction proceeding based on different issues and different burdens of proof to make findings of fact and conclusion of law against Defendant as though on the merits. This decision conflicts with the decisions of other state courts of last resort, and this Court's holdings requiring notice and an opportunity to be heard guaranteed by Due Process.

III. The Superior Court of Pennsylvania, without notice, raised and decided on appeal a new issue.

The first time on appeal, the majority of nine (9) appeal judges of The Superior Court and the majority of The Supreme Court of Pennsylvania vacated and remanded this case because a meaningful review was not possible, and no evidence was presented by Plaintiff against Defendant at trial citing precedent that a preliminary injunction hearing was for "an urgent necessity for interim relief before the case [could] be heard on the merits." However, at the hearing addressing issues on the appeal Chalky was required to show by clear and convincing evidence that Roush exerted undue influence.

The second time on appeal, on the exact same facts,

the majority of three (3) appeal judges of The Superior Court of Pennsylvania raised and decided new issue limiting Defendant's first Motion to Dismiss as for failure to receive a witness list ("...what they were going to testify to, about, and any types of reports that he has.") and since no one was going testify against him, the Motion to Dismiss was properly denied. The Court failed to address the trial judge's sua sponte incorporation, without notice prior to trial, of a prior preliminary injunction hearing testimony based on different issues and a different burden of proof than the equity trial on the merits requiring clear and convincing evidence. Rather, the Court found an appearance of an understanding to incorporate and deciding a totally different outcome on the same exact facts.

The violation of Petitioner's rights to Due Process guaranteed by the 5th and 14th Amendments to The Constitution of The Untied States of America conflicts with every holding of this Honorable Supreme Court of the United States of America, and other state courts of last resort. No citizen of The United States of America has lost real property in an equity trial when the moving party presented no evidence whatsoever in support of their case.

CONCLUSION

For the reasons set forth above, the Court should Grant a Writ of Certiorari.

Dated: Johnstown, Pennsylvania
July 22, 2005

Respectfully submitted,

Franklin D. Roush, Jr., Esquire
Counsel of Record for Petitioner

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARY CHALKEY,
A/K/A MARY MATULA No.459 WAL 2004

Respondent

v.

FRANKLIN DELANO ROUSH, JR.

Petitioner

ORDER

PER CURIAM:

AND NOW, this 31st day of May, 2005, the

Application for Reconsideration id hereby DENIED.

A True Copy John A. Vaskov
As of May 31, 2005
Attest: John A. Vaskov
Deputy Prothontary
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARY CHALKEY,
A/K/A MARY MATULA,

No. 459 WAL 2004

Respondent

v.

Petition for Allowance of Appeal from the Order of the Superior Court

FRANKLIN DELANO ROUSH, JR.,

Petitioner

ORDER

PER CURIAM:

AND NOW, this 24th day of February, 2005, the Petition for Allowance of Appeal is hereby DENIED.

A True Copy Patricia Nicola
As of: February 24, 2005
Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

August 13, 2004

Nancy L. Harris, Esquire
117 N. Main Street
Greensburg, PA 15601-2403

IN RE: MARY CHALKEY V FRANKLIN ROUSH
NO. 1139 WDA 2003

Dear Ms Harris:

The Court has entered the following Order on the Application for Reargument or Reconsideration in the above-captioned matter:

"ORDER OF COURT

The court hereby DENIES the application filed June 16, 2004, requesting or reconsideration or Reargument of the decision dated June 4, 2004.
Date: August 13, 2004.

PER CURIAM"

Very truly yours,

Eleanor R. Valecko
DEPUTY PROTHONTARY

ERV/ksj
cc: Ronald P. Carnevali, Esquire
Honorable Norman Kremenacker, III

J.A08021/04

NON-PRECEDENTIAL DECISION
SEE SUPERIOR COURT I.O.P. 65.37

MARY CHALKEY,
A/K/A MARY MATULA,

Appelle

IN THE
SUPERIOR COURT
OF
PENNSYLVANIA

v.

FRANKLIN DELANO ROUSH, JR.,

Appellant

No.1139 WDA 2003

Appeal from the Decree entered on May 22, 2003
in the Court of Common Pleas of Cambria County,
Civil Division, No. 1997 - 3857

BEFORE: DEL SOLE, P.J., MUSMANNO and ORIE MELVIN, JJ.

MEMORANDUM: FILED: June 4, 2004

Franklin Delano Roush, Jr., ("Roush") appeals from the Decree entered by the trial court, which declared a contract for the sale of land between Roush and Mary Chalky, a/k/a Mary Matula ("Chalkey"), null and void. We affirm.

In a prior appeal, the Pennsylvania Supreme Court summarized the history of this case as follows:

> In April 1994, the Court of Common Pleas of Cambria County entered a judgment of approximately $80,000 against Chalkey pursuant to an action brought by her brother's estate seeking liquidation of a property interest that her brother shared with her. Attorney Rex W. McQuaide represented Chalkey in that action. McQuaide also assisted Chalkey in trying to secure the money to satisfy the judgment she owed to her brother's estate. When Chalkey failed to satisfy the judgment by late 1995, a judgment creditor scheduled a sheriff's sale [for] December 8, 1995 for a large parcel of property owned by Chalkey.
>
> In November 1995, Chalkey retained Roush to act as her attorney in an attempt to stay the scheduled sheriff's sale. Roush, acting on behalf of Chalkey, filed a motion for a stay of the sale, and on December 4, 1995, the trial court held a hearing on the motion. Following the hearing, the trial court denied the motion for stay. Later that day, however, Chalkey entered into a contract of sale with Roush for the large parcel of land scheduled to be sold in exchange for $76,000.00, the amount remaining under the judgment against her.

In October 1997, Chalkey filed an action in equity requesting that the trial court declare the sale of the parcel to Roush void and require Roush to account to her for any revenue obtained from either a disposition of the property or a sale of timber from the property. [1] Chalkey argued that Roush had exerted undue influence over her by using his position as her attorney to convince her to sell him the property for much less than its value. Furthermore, according to Chalkey, Roush was guilty of fraud and or/ false pretense because he led Chalkey to believe that he was merely loaning her the money in order to prevent the sheriff's sale.

On July 13, 1998, the trial court held a trial regarding the merits of Chalkey's claims. At the close of the trial, the trial court incorporated, the evidence from the previous proceedings, including the lengthy October 10th trial concerning the permanent injunction.[2] **See** [footnote 1], *supra.*

---

[1] Chalkey also sought preliminary and permanent injunctions restraining Roush from conveying the property, emcumbering the property, or selling timber from the property. Upon the filing of her Complaint, the trial court granted Chalkey's request for a preliminary injunction and following a lengthy trial on October 10, 1997, it also granted Chalkey's request for a permanent injunction.

[2] Neither party objected to this incorporation of evidence from the previous trial.

> On August 11, 1998, the trial court issued an opinion containing findings of fact and conclusions of law. Specifically, the trial court determined that a confidential relationship existed between Roush and Chalkey and that Roush took unfair advantage of that relationship in order to obtain the property from Chalkey for less than its value. The trial court therefore found that the contract for the sale of the property should be voided based on the theory of undue influence and the parties should be returned to the positions they occupied before the transfer of the property. Accordingly, the trial court entered an order in which it declared the sale of the property void, instructed Roush to transfer the property back to Chalkey, and directed Roush to pay Chalkey the sums he received from an agreement to sell timber that was located on the property.

Chalkey v. Roush, 805 A.2d 491, 492-93 (Pa. 2002) (footnote omitted).

Roush filed an immediate appeal of the trial court's Order. Ultimately, this case was remanded to the trial court so that Roush could file post-trial motions in accordance with Pa.R.C.P. 227.1 ***See id.*** at 497 (remanding the matter to the trial court for the entry of a decree *nisi* and to allow Roush to file post-trail motions). On remand, Roush filed post-trial Motions, which the trial court denied. Upon the trial court's entry of a Final Decree, Roush filed the instant timely appeal.

Roush present the following claims for our review:

1. Where the party bearing the burden of proof fails to introduce evidence to sustain that burden, and a motion to dismiss is made by the opposing party, is it trial error, requiring reversal, for the trial court to sua sponte incorporate the evidence which it believes would sustain that burden, and then rely upon that evidence to decide in favor of the party bearing the burden of proof?

2. Where [Chalkey} alleges undue influence, but the only evidence in the record indicates that [she] relied on someone other than [Roush], and there is no evidence in the record, relevant to the time of the transaction, as to either [Chalkey's] mental state and cognitive abilities or to the exercise of any influence by [Roush], is it trial error, requiring reversal, for the trial court to deny [Roush's] motion to dismiss?

Brief for Appellant at 6.

Our review of a final decree in equity is limited to determining whether the trial court abused its descretion or committed an error of law. ***Roberts v. Estate of Pursley***, 718 A.2d 837, 840 (Pa. Super. 1998). This Court will not disturb a final decree unless it is demonstrably capricious or unsupported by the evidence. ***Id.*** However, "we are not bound by the [trial court's] conclusions of law; rather, where the

rules of law on which the [trial court] relied are palpably wrong or clearly inapplicable, we will reverse the [trail court's] decree." ***In Re Estate of Cambest,*** 756 A.2d 45, 50 (Pa. Super. 2000) (citations and quotations omitted.)

Roush first claims that the trial court erred when it *sua sponte* incorporated Chalkey's prior testimony into the record, and then relied on that evidence in rendering its verdict. Roush claims that at the hearing on July 13, 1998, he presented an oral Motion to dismiss the case. Roush asserts that he made the Motion to dismiss "on the basis that Chalkey had introduced no evidence." Brief for Appellant at 24. According to Roush, he did not object to the trial court's subsequent *sua sponte* admission of the prior testimony because such an objection would have been futile after his Motion to dismiss had been denied. However, our review of the record discloses a somewhat different procedural scenario.

Intially, we note, that the admission of evidence is within the sound descretion of the trial court; we may only reverse upon a showing that the trial court clearly abused its descretion or committed an error of law. ***Hutchinson v. Luddy***, 763 A.2d 826, 838 (Pa. Super. 2000). "[I]n order for a claim of error to be preserved for appellate review, a party must make a timely and specific objection before the trial court at the appropriate stage of [the] proceedings; the failure to do so will result in a waiver of the issue." ***Kaufman v. Campos***, 827 A.2d 1209, 1212 (Pa. Super. 2003).

In its opinion dated May 22, 2003, the trial court noted that Roush failed to object to the incorporation of Chalkey's prior testimony into the record. Trial Court Opinion, 5/22/03, at 5. The trial court's determination is supported by the record. As set forth above, Chalkey filed a Complaint in equity seeking a preliminary injunction, a permanent injuction, and an order voiding her sale of the property to Roush. On October 10, 1997, the trial court conducted a hearing on Chalkey's request to continue the preliminary injunction previously granted. At the close of that hearing, the trial court granted Chalkey's request to continue the preliminary injunction. N.T., 10/10/97, at 132. On October 17, 1997, the trial court entered an Order which stated: "[T]his Court makes a finding that [Chalkey] is not *sui juris* and, for that reason, appoints Attorney Gary Horner ["Horner"] as a guardian *ad litem* in her behalf." Trial Court Order, 10/17/97.

At the beginning of the proceedings on July 13, 1998, Attorney Horner informed the Court that as a result of Chalkey's physical condition, she would be unable to appear in court.[3] N.T., 7/13/98, at 3-5. At that time, the following discussion transpired:

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[3] According to Horner, Chalkey's medical condition included melanoma, multiple vertebrae and rib fractures, and the presence of a feeding tube.

[Horner]: ...I don't believe that Mrs. Chalkey in the immediate future is going to be able to proceed with this matter physically. And I don't think that it's likely that she's going to be able to proceed emotionally either, Your Honor. We have some suggestions for the Court that we can put on the record later, if the Court would like us to do that.

THE COURT: Okay. Well, is ther any comment by you, Mr. Markovitz, or you Mr. Roush, on that? I certainly understand and will accept references as to [Chalkey's] absence, and we can address later whether it means anything as far as what we can and cannot do both in the injunctive proceeding and in the equity proceeding.

[Roush]: Your Honor, may it please the Court, that at the status conference, that we had agreed--- it was placed on [the record] that Mr. Horner would give me a list of his witnesses, what they were going to testify to, about, and any type of reports that he has. **As of to day, the day of the trial, I don't have any lists whatsoever of anyone testifying. I request that the case be dismissed based on that.** Thank you, Your Honor.

THE COURT: This is your Motion for Summary Judgment?[4]

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[4] Roush's Motion for Summary Judgment was based upon his claim that Chalkey sought equitable relief with "unclean hands." N.T., 7/13/98, at 18.

[Roush]: No. This is just a response to---

THE COURT: Okay, Mr. Horner, do you anticipate any further testimony in the equity proceeding? I know that we - all I addressed previously was the injunctive proceeding, and I know that the two are necessarily related, but do you anticipate any further testimony in that injunctive - or in the equity proceeding?

[Horner]: Your Honor, we don't anticipate any further testimony. I'm not sure I need to respond to Mr. Roush's statements, but if there were witnesses to be called, I certainly would have made them available. Perhaps he didn't understand; my conversations with Dr. Donrovich took place last week. So I don't have any reports from Dr. Donrovich, and between last Wednesday and today, and no, I did not submit his name to you. His name did not come up before this proceeding was scheduled.

THE COURT: If he would [testify], it wouldn't be to the matters at issue, but merely the issue of competency. So as far as the equity proceeding, if you have no witnesses that you expect to call other than him, potentially on copetency, then on that basis I'll deny the Motion to Dismiss.

Id. at 5-7. Thus, it appears from the above discussion that Roush moved to dismiss the case based upon

Horner's failure to provide a list of witnesses, and not based upon a lack of evidence. This interpretation is supported by what next transpired.

After the above discussion, the parties proceeded to argue motions for summary judgment presented by Roush and McQuaide. [5] The trial court ultimately granted McQuaide's Motion, but denied Roush's Motion for summary judgment. ***Id.*** at 28. After the trial court orally denied Roush's Motion, the following discussion *immediately* transpired.

> ATTORNEY ROUSH: Your Honor, I have some testimony then because we were scheduled for trial -
>
> THE COURT: Okay.
>
> ATTORNEY ROUSH: -- if the Court permits that.
>
> THE COURT: Sure.
>
> ATTORNEY ROUSH: I'll call Deborah Birkhimer to the stand.

N.T., 7/1/398, at 29. When Chalkey's counsel requested an offer of proof,

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[5] Roush had joined McQuaide as an additional defendant.

Roush stated:

> Your Honor, Miss Chalkey testified throughout the injunction proceedings that she knew nothing about the James Jaskula offer [to purchase the property], and that was despite James Jaskula testifying on pages 23 and 24 that he directly told her his offer, even though he changed it. So, the narrow scope that I have for this particular witness is to what she heard Miss Chalkey say as it relates to the James Jaskula offer, and that's all. It goes to impeach Ms Chalkey, stating that she knew nothing of the James Jaskula offer when she was talking about the James Jaskula offer at my office, that she refused to sell it to him.

Id. at 31. Thus, Roush presented Birkhimer's testimony to impeach the prior testimony of Chalkey, testimony that had been presented during the hearing on the preliminary injunction.

At the close of Birkhimer's testimony, and after Roush indicated that he had no other witnesses, the trial court stated:

> Then I assume that - I intend to incorporate, **unless there's an objection,** the transcripts of the prior proceedings that I had on this matter. Those would be the transcripts of the hearing of October 10, 1997, and the - it seems to me that we had another hearing, and I'm trying to find the date.

Id. at 37 (emphasis added) [6]. Roush offered no objection the ithe incorporation of Chalkey's testimony.

Thus, our review of the record does not support Roush's claim that he had moved to dismiss Chalkey's equity action based upon counsel's failure to present Chalkey as a witness at the July 13, 1998 hearing. Moreover, it appears from the record that the parties proceeded in accordance with an understanding that Chalkey's testimony would be incorporated into the record, and Roush did not object to this procedure at any time. Finally, Roush offered no objection to the incorporation of Chalkey's prior testimony, despite the trial court's express inquiry as to whether anyone objected to its incorporation. We cannot conclude based upon the record before us, that Roush preserved his challenge to the incorporation of Chalkey's testimony by making a timely objection during the hearing. Accordingly, that claim is waived.

Roush next claims that the trial court improperly voided Chalkey's conveyance of property to Roush. According to Roush, Chalkey failed to establish undue influence by Rous. Specifically, Roush asserts that Chalkey failed to prove that there was a confidential relationship between her and Roush "based upon facts which made it clear that she depended upon Roush and that Roush was able to exercise an over-mastering

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[6] The trial court also noted that the "prior proceeding" had involved settlement discussions. *Id.* at 37. The trial court did not participate in those discussions and had ordered that the transcribed notes of those discussions be sealed. *Id.*

influence over her." Brief for Appellant at 26. We disagree.

Whether undue influence was exercised must often be inferred from the facts and circumstances of the particular case. ***Kees v. Green***, 75 A.2d 602, 606 (Pa. 1950). Because undue influence has been described as subtle, intangible, yet recognizable by human experience, it may be shown by circumstantial evidence. ***In re Luongo***, 823, A.2d 942, 964 (Pa. Super. 2003).

A confidential relationship appears "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, *or*, on the other, weakness, dependence or trust, justifiably reposed [.]" ***Owens v. Mazzei,*** 2004 PA Super 106 at 20 (emphasis in orginal) (citing ***Frowen v. Blank***, 425 A.2d 412, 416-17 (Pa. 1981).

> When the relationship between the parties to an agreement is one of trust and confidence, the normal arm's length bargaining is not assumed, and overeaching by the dominant party for his benefit permits the aggrieved party to recind the transction. This is so because the presence of a confidential relationship negates the assumption that each party is acting in his own best interest. Once a confidential relationship is shown to have existed, it then becomes the obligation of the party attempting to enforce the terms of the agreement to

> establish that there has not been a breach of trust.

Frowen, 425, A.2d at 416-17 (citations omitted). "[A] confidential relationship is not limited to any particular association of parties but exists wherever one occupies towards another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest...." ***Id.*** at 417 (citations omitted). Moeover, "those who purport to give advice in business may engender confidential relations if other, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a lever of trust that they seek no other counsel." ***Basile v. H & R Block***, 777 A.2d 95, 102 (Pa. Super.2001).

Here, the trial court determined that a confidential relationship existed between Roush and Chalkey. In support of this determination, the trial court stated:

> While [Roush] might not have been acting as [Chalkey's] attorney at the time of the sale of the property due to Judge Swope's ruling [precluding McQuaide from withdrawing as Chalkey's counsel], [Chalkey] relied on and trusted [Roush] as if he were her attorney. This court finds on the basis of the testimony of [Chalkey] that she accepted [Roush's] offer to purchase the property because of her reliance, dependence and trust in [Roush's] knowledge and position as an attorney and her belief that he was acting in her best interests. When she testified in

> in this case, the court was struck by [Chalkey's] indecisiveness and it was apparent the stress she felt as a result of losing this property which was her homestead. Also, throughout the proceedings, this court saw that [Chalkey] readily switched allegiances, indicating her inital trust then distrust for a number of individuals to include [Roush], her prior counsel, her realtor and her financial advisor, each of whom, if you accept [Chalkey's] testimony earned this change in regard. ([Chalkey] was even initially distrustful of this court and the attorney it appointed to act as her guardian *ad litem*. Fortunately this guardian has rendered, and this court knows he will continue to render [Chalkey] the type of advice and loyalty she deserves.) Based on her testimony and the observations by the court it is easy to conclude that [Chalkey] was suject to influence and dependant on and trusting of others in these very important matters. As a result of all this, this court concludes that a confidential relationship existed between [Roush] and [Chalkey].

Trial Court Opinion, 12/16/02, at 3-4. the trial court's findings in this regard are supported by the evidence of the reocrd.

We additionally point out that during

cross-examination, Roush asked Chalkey whether she had asked him to purchase the 16-acre parcel and let her live in the house on the property. N.T., 10/10/97, at 57. Chalkey responded: "I didn't asky you anything. I think you told me." ***Id.*** Chalkey further testifed that she did not believe that she has the mental capacity to understand the nature of the deed transferring the property to Roush at the time of the transfer. ***Id.*** at 75. Finally, we note that Roush admitted that he had known Chalkey for twenty-six years. N.T. 10/10/97, at 115.

Based on the foregoing, we conclude that the trial court's finding of a confidential relationship is supported by the evidence of the record. "Accordingly, we affirm the Decree of the trial court, which voided the contract of sale bewteen Roush and Chalkey.

Decree affirmed.

Judgment Entered:

Eleanor R. Valecko
Deputy Prothonotary

Date: June 4, 2004

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
CIVIL DIVISION

MARY CHALKEY a/k/a
MARY MATULA,
Plaintiff

No. 1997- 3857
Motion for Permanent
Recusal

vs.

Filed by:
Kelly Jo Biloick, RMR
Official Court Reporter

FRANKLIN DELANO ROUSH, JR.,

Defendant.

Date: April 7, 2003

Presiding Judge:
Hon. Timothy P. Creany

Reported at:
Cambria County
Courthouse
Courtroom No. 3
Ebensburg, PA

Counsel of Record:

For the Plaintiff:
GARY HORNER, ESQ

For the Defendant:
H. REGINALD
BELDEN, ESQ

PROCEEDINGS

THE COURT: Next is Chalkey/Roush. I invited this. It shows the -- my judgment, I guess. But if we could just talk about this maybe even off the record.

OFF RECORD DISCUSSION

THE COURT: Okay. If we can go on the record, as I said to Mr. Belden as he approached, I invited this. I probably should not have heard the matter at argument court.

I heard the case long before the issue that led to my suggestion of recusal came up. But about two years later, I employed Mr. Horner and, on the request of counsel, did recuse myself. And I then invited Mr. Belden and Mr. Horner to tell me, what do we do from hereon out, assuming that Judge Krumenacker does not grant the motion made by Mr. Belden. Mr. Belden?

ATTORNEY BELDEN: Yes, Your Honor. I believe that Judge Krumenacker, as I said, may either adopt the decree nisi as it exists and make it a final order, or he may fashion his own final order as he deems approprate.

THE COURT: Mr. Horner, do you have an objection to my permanently recusing myself and allowing Judge Krumenacker to -- I mean, Judge Krumenacker may have an objection. But the issue is, do you?

ATTORNEY HORNER: Subject to the conditions that Mr. Belden just suggested, I would agree.

THE COURT: Then I'll sign the order you proposed and attached to your petition, Mr. Belden.

ATTORNEY BELDEN: Thank you, Your Honor.

ATTORNEY HORNER: Your Honor, does that order include the conditions we just discussed?

THE COURT: All it says is in view of the circumstances outlined and in light of counsel's motion, the motion is granted. I will communicate with Judge Krumenacker today if he is here and let him know that -- maybe I should amend this, only to add that Judge Krumenacker must either adopt the decree nisi that I framed or draft his own decree nisi to which exceptions could be taken.

ATTORNEY BELDEN: Well, no. He would draft the final order.

THE COURT: The final decree.

ATTORNEY BELDEN: I believe, yes.

THE COURT: What I'll do then is this rather than this. Now, this 7th day of April, in view of the circumstances outlined by this court to counsel and in light of counsel's motion for permanent recusal from this matter, the motion is granted.

Further, Judge Krumenacker shall, on resolution of the motions currently before him, either adopt the decree nisi drafted by this court or draft his own permanent decree, presuming that the motions are denied. In the event the motions are granted, then further hearing will be necessary.

ATTORNEY BELDEN: Well, no. He would still fashion his own final order. There wouldn't be any necessity for any further hearings.

THE COURT: Well, then take ut the last paragraph -- or the last sentence. Okay?

ATTORNEY HORNER: Thank you.

ATTORNEY BELDEN: Fine.

THE COURT: All right

****

KELLY JO BILONICK, RMR
OFFICIAL COURT REPORTER
47TH JUDICIAL DISTRICT

CERTIFICATE OF REPORTER

I hereby certifiy that the proceedings and evidence upon the hearing of the within cause are fully and accurately contained in the notes taken by me and that this is a true and correct transcript of the same.

Kelly Jo Bilonick, RMR
Offical Court Reporter

CERTIFICATE OF JUDGE

The foregoing record of the proceedings and evidence taken upon thie hearing of the within cause is hereby approved and directed to be filed.

Timothy P. Creany, J.

KELLY JO BILONICK, RMR
OFFICIAL COURT REPORTER
47TH JUDICIAL DISTRICT

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
CIVIL DIVISION

MARY CHALKEY a/k/a
MARY MATULA,

Plaintiff

vs.

FRANKLIN DELANO ROUSH, JR.,

Defendant

No. 1997 - 3857
Motion for Recuse

Filed by:
Kelly Jo Bilonick, RMR
Offical Court Reporter

Date: February 14, 2003

Presiding Judge:
Hon. Timothy P. Creany

Reported at:
Cambria County
Courthouse
Courtroom No. 3
Ebensburg, PA

Counsel of Record:

For Plaintiff:
GARY C. HORNER, ESQ

For Defendant:
H. REGINALD
BELDEN, ESQ

PROCEEDINGS

THE COURT: This is in the case of Mary Chalkey vs. Franklin Roush. I heard arguments on the defendant's exceptions and motions for post-trial relief. And I should have before but after the fact pointed out to Mr. Belden that Mr. Horner, who had been the guardian of Mrs. Chalkey, has represented me as executor of my father's estate. My father passed away in 2001, so it was after these matters occurred.

As well as representing me as executor of the estate, he filed a claim on behalf of the estate with me as the moving party. I pointed that out and feared that Mr. Belden was unaware of that, feared that that may be a basis for him to aske me to recue. And, Mr. Belden?

ATTORNEY BELDEN: Yes, Your Honor. As you know, even the appearance of impropriety is something with which we must be guarded, and consequently, I -- without casting any disparagements upon this court, of course, I do ask that you recuse.

THE COURT: I am going to grant your motion and I apologize to everyone. Frankly, this is something that I should have brought to everyone's attention, should have done before this point.

I hope that I can convince one of my colleagues who are on this panel to hear argument this morning and not inconvenience the parties any further. I will let you know whether or not that's so as soon as we're done here. I have to go back with the court en banc, and I'll either ask Judge Krumenacker or Judge Swope

if either will take it.

If we can then meet back in courtroom one, I'll let you know what happens. Thank you.

****

KELLY JO BILONICK, RMR
OFFICIAL COURT REPORTER
47TH JUDICIAL DISTRICT

CERTIFICATE OF REPORTER

I hereby certify that the proceedings and evidence upon the hearing of the within cause are fully and accurately contained in the notes taken by me and that this is a true and correct transcript of the same.

Kelly Jo Bilonick, RMR
Official Court Reporter

CERTIFICATE OF JUDGE

The foregoing record of the proceedings and evidence taken upon the hearing of the within cause is hereby approve and directed to be filed.

Timothy P. Creany, J.

KELLY JO BILONICK, RMR
OFFICIAL COURT RPORTER
47TH JUDICIAL DISTRICT

(3)

No. 05-132

Supreme Court, U.S.
FILED
AUG 25 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FRANKLIN D. ROUSH, JR.,

Petitioner,

v.

MARY CHALKEY, a/k/a MARY MATULA,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania, Pittsburgh Office

BRIEF OF RESPONDENT, MARY CHALKEY, a/k/a MARY MATULA, IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should the United States Supreme Court exercise its certiorari jurisdiction where the Petitioner raises, for the first time in his Petition for Writ of Certiorari, the contention that his due process and constitutional rights were violated?

A. May the Petitioner raise, for the first time in a Petition for Writ of Certiorari, a claim of depravation of due process and/or constitutional rights alleging that the Trial Judge failed to timely recuse himself, where such claims were never raised before or addressed by the state appellate courts?

B. Should the United States Supreme Court exercise its certiorari jurisdiction where the Petitioner has reclassified previously appealed evidentiary and procedural issues in a due process and/or constitutional light, where the due process and constitutional claims were never raised before or addressed by the state appellate courts?

LIST OF PARTIES

Petitioner, Franklin D. Roush, Jr., Esquire

Respondent, Mary Chalkey, a/k/a Mary Matula

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STATUTES

28 U.S.C. § 1257 7

COUNTER-STATEMENT OF THE CASE

This matter arises from an equity action brought by Appellee, Mary Chalkey, now the Estate of Mary Chalkey, deceased, (hereinafter referred to as "Chalkey"), seeking to nullify a conveyance of real property from Chalkey to Appellant, Franklin Roush, Esquire, (hereinafter referred to as "Roush"), as the sale was tainted by a confidential relationship and undue influence.

At all times relevant hereto, Chalkey was the owner of three adjacent parcels of real estate. As a result of a judgment entered against her in an unrelated suit, the largest of the three parcels was scheduled for a sheriff's sale. At the time of the scheduling of the sheriff's sale, Chalkey was represented by Attorney Rex McQuaide, (hereinafter referred to as "Attorney McQuaide"). Prior to the sale, Chalkey retained Roush to attempt to postpone the sheriff's sale, paying him a retainer of $3,000.00.

A Motion to Stay the pending sheriff's sale was filed by Roush with the Trial Court and was scheduled before The Honorable Thomas P. Swope, (hereinafter referred to as "Judge Swope"). Attorney McQuaide indicated to the Court that he had clients who were interested in purchasing the property from Chalkey and, as such, he would withdraw as counsel and Roush would represent Chalkey. Judge Swope advised that he would not permit Attorney McQuaide to withdraw as counsel, but would permit Roush to act as co-counsel. Roush informed the Court that he did not wish to act as co-counsel. Judge Swope thereafter, denied the Motion to Stay.

On that same day, Chalkey received an offer from a client of Attorney McQuaide's for the purchase of the three parcels of property. The offer set forth that the prospective

purchaser would pay to Chalkey the sum of $66,000.00 for a 4.5 parcel tract along with a $10,000.00 payment for an option to purchase the remaining acreage for additional consideration of $246,000.00. In addition, near the time of the transfer which is the subject of this lawsuit, an offer from a private party for the purchase of the entire parcel of property for $350,000.00 was discussed.

Within hours of the hearing on the Motion to Stay and after rejecting the proposed $322,000.00 transfer and option offer, Chalkey conveyed the entire parcel to Roush for the amount of $76,000.00, well below any offer previously made. The $76,000.00 paid by Roush for the entire parcel was the exact amount necessary to satisfy the judgment and avoid the sheriff's sale and was the same amount Chalkey could have received for a small portion of the property from Attorney McQuaide's clients.

Following the transfer of the property, Chalkey was permitted by Roush to live, rent free, in any one of the houses located on the property. The property was eventually sold by Roush for in excess of 1.5 million dollars, the proceeds of which have been held in trust, pending the outcome of this lawsuit.

On October 6, 1997, Chalkey filed a Complaint in Equity against Roush seeking to have the transfer declared null and void and requiring Roush to convey the property back to Chalkey. Chalkey's Complaint in Equity also requested an injunction precluding Roush from selling, otherwise encumbering or timbering the property.

At all times during the pendency of the underlying equity action, Roush, an attorney, represented himself. A preliminary injunction was granted and three days later, a hearing was held to determine whether or not the

injunction should continue. At the hearing on the request that the injunction continue, Chalkey testified. At the conclusion of the hearing, the trial court continued the injunction.

A subsequent hearing was scheduled on the merits of the Complaint. At that hearing, counsel for Chalkey advised that Chalkey was unavailable to testify due to her physical and mental condition. Roush then made a Motion to Dismiss based solely on Chalkey's failure to provide Roush with a list of witnesses and their proposed testimony. That Motion to Dismiss was denied by the trial court. Roush then called one witness to testify on his behalf in an effort to rebut or discredit testimony previously offered by Chalkey during the injunction hearing.

Upon completion of Roush's witness' testimony, the Court advised that it intended to incorporate the transcripts of the prior proceedings it had held on the matter unless there was an objection by either party. No objection was made and the transcripts of the prior proceedings were incorporated.

Thereafter, Roush made a second Motion to Dismiss alleging that insufficient evidence existed to establish undue influence. That Motion was also denied by the Court.

Following the hearing on the merits, the Court ruled in favor of Chalkey finding that a confidential relationship existed and that the transfer from Chalkey to Roush was void due to undue influence. After a number of appeals based on procedural technicalities, the matter was remanded to the trial court for issuance of a *Decree Nisi*. On remand, the Court issued a *Decree Nisi* and adopted its original Opinion and Order. Roush filed Post-Trial Motions

following the issuance of the *Decree Nisi*. The Court then issued a Final Decree, Opinion and Order dismissing the Post-Trial Motions and affirming the *Decree Nisi*.

Roush filed a Notice of Appeal and a Concise Statement of Matters Complained of on Appeal based on the denial of the Post-Trial Motions. The Court then issued an Opinion adopting its Final Decree, Opinion and Order affirming the *Decree Nisi*.

After the issuance of the Final Decree, Roush filed an Appeal to the Superior Court of Pennsylvania and alleged, in pertinent part, that the trial court committed reversible error when it *sua sponte* incorporated the transcripts and testimony of a prior proceeding into a hearing on the merits of the Complaint and that Chalkey failed to present sufficient evidence to establish the existence of a confidential relationship and undue influence such that Roush's Motion to Dismiss should have been granted. The Superior Court determined, after commenting on the appropriateness of admission of evidence by the trial court, that Roush failed to preserve and/or waived any challenge to the incorporation of Chalkey's testimony due to his failure to make a timely objection during the hearing. Further, the Superior Court determined that the Trial Court's findings of a confidential relationship and undue influence were clearly supported by record evidence. Roush filed an Application for Reargument or Reconsideration with the Superior Court, which was subsequently denied.

Upon denial of his Application for Reargument or Reconsideration, Roush filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. That Petition alleged, in pertinent part, that the Superior Court erred in holding that the Trial Court properly denied

Roush's first Motion to Dismiss and that Roush waived any objection to the Trial Court's *sua sponte* introduction of transcripts of prior testimony for failure to make a timely objection at trial.

Roush's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied. He then filed an Application for Reconsideration which was similarly denied.

Before this Court, and for the first time, Roush now contends that his due process and/or constitutional rights were violated because the Trial Judge, The Honorable Timothy P. Creany, (hereinafter referred to as "Judge Creany"), failed to timely recuse himself and/or reveal a business relationship with Chalkey's counsel. It is important to note that the business relationship between Judge Creany and Chalkey's counsel resulted from Chalkey's counsel being retained to act as counsel for the Estate of Judge Creany's deceased father, more than three years after the hearing which is at issue in this case. Judge Creany, as the Executor of his father's Estate, acted as the moving party in a lawsuit filed by the Estate.

Similarly, in a re-characterization of previously ruled upon procedural and evidentiary issues, Roush now, for the first time, claims that his due process and/or constitutional rights were violated when the Trial Court *sua sponte* incorporated testimony from a prior proceeding into the hearing on the merits of the Complaint and when the Pennsylvania Superior Court determined that the denial of his Motion to Dismiss by the Trial Court was appropriate.

SUMMARY OF THE ARGUMENT

The Petitioner cannot raise, for the first time on a Petition for Writ of Certiorari, the contention that his due process and/or constitutional rights were violated because no Pennsylvania state appellate court has had an opportunity to review and address such claims.

ARGUMENT

1. THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION AS THE PETITIONER FAILED TO RAISE HIS ALLEGED DUE PROCESS AND/OR CONSTITUTIONAL CLAIMS IN THE PENNSYLVANIA STATE COURTS AND NO STATE COURT HAS ADDRESSED SUCH CLAIMS.

In his Petition for Writ of Certiorari, Roush, an attorney who represented himself at the trial court level, claims that his due process and/or constitutional rights were violated when the Trial Judge failed to timely recuse himself. Further, Roush alleges that his due process and/or constitutional rights were also violated when the Trial Court incorporated testimony from a preliminary injunction hearing into the hearing on the merits of the Complaint and when the Pennsylvania Superior Court concluded that the Trial Court properly denied his Motion to Dismiss.

Roush's challenge concerning the Trial Judge's failure to timely recuse himself was not previously raised before any Pennsylvania appellate court and appears, for the first time, in Roush's Petition for Writ of Certiorari to this Court. The issues concerning the Trial Court's incorporation of

prior testimony and denial of Motion to Dismiss were raised on procedural and evidentiary grounds before the Pennsylvania appellate courts. However, it is not until this Petition for Writ of Certiorari that due process and/or constitutional challenges regarding those actions were raised.

Under the jurisdictional grant of 28 U.S.C. § 1257, this Court may review state appellate decisions as follows:

> Final judgments or decrees rendered by the highest court of state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

However, the certiorari statute furnishes the Supreme Court with no jurisdiction unless a federal question has been both raised and decided by the state court below. *See*, *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 391 (1981). The jurisdiction of the Supreme Court to reexamine the final judgment of a state court can arise only if the record as a whole shows that either expressly or by clear implication a federal claim was adequately presented in the state system. *Id.*

This Court has advised that it will refuse to consider petitioner's claims that were not raised or addressed below. *See*, *Yee v. City of Escondido, California*, 503 U.S.